



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.522 OF 2014

BETWEEN

OBONDO VICTOR1ST PETITIONER
MUSA ALI BASHIR.....2ND PETITIONER
ABDI YUNIS KHALID.....3RD PETITIONER
JAMA FARAH MOHAMUD.....4TH PETITIONER
SAID HAMISI MGUPU.....5TH PETITIONER
AMINA ABDI HASHI.....6TH PETITIONER
AHMED ABDIRASHID HASSAN.....7TH PETITIONER
ALI OSMAN.....8TH PETITIONER

AND

THE LAW SOCIETY OF KENYA.....RESPONDENT

JUDGMENT

Introduction

1. The Petitioners have described themselves as adherents of the Islamic faith and are members of; the Law Society of Kenya (LSK) and Group Muslim Lawyers Forum. In their Petition dated 27th October, 2014 they are challenging the legality and constitutionality of the construction of the proposed LSK International Arbitration Centre by the Respondent in South C area within Nairobi County. They claim in that regard that they cannot be compelled to contribute to the financing of the proposed construction of the International Arbitration Center as it is contrary to their belief and/or religion and thus a violation of **Article 32** of the **Constitution**.
2. The factual background leading to the Petition is uncontested and is as detailed herebelow;
3. It is claimed that by a notice dated 18th August 2014, the Respondent informed its members of a

Special General Meeting (SGM) to be convened on 27th September, 2014 at Tsavo Ballroom at the Hilton Hotel. The Notice stated that the agenda of the said meeting would be the construction of the LSK Arbitration Centre and Any Other Business. At the Special General Meeting, it was resolved that Members of the Respondent would contribute to the financing of the construction of the Arbitration Center which would also contain a bar-establishment serving alcoholic drinks. It was also purportedly resolved that 70% of the project cost would be financed by means of a loan facility which would attract interest until paid in full. The said resolution for avoidance of doubt read thus;

“As a means of raising funds towards the construction of the Law Society of Kenya International Arbitration Center , Offices and Convention Centre, this meeting authorizes borrowing to cater for part of the construction cost and all members of the Law Society of Kenya do contribute towards part of the said cost as follows:-

- a. *For all members who have practiced for less than 5 years, a sum of Kshs.39000 payable in three installments of Kshs.13,000 on or before 28th February 2015; Kshs.13,000 on or before 28th February, 2016, Kshs.13,000 on or before 28th February 2017.*
- b. *For all members who have practiced for 5 years but less than 20 years, a sum of Kshs.39,000 payable in two installments of Kshs.19,500 on or before 28th February, 2015 and Kshs.19,000 on or before 28th February, 2016.*
- c. *For all members who have practiced for 20 years and above, one off contribution of Kshs.50,000 payable on or before 28th February, 2015.*
- d. *For all advocates who are to be admitted to the bar after 28th February, 2015 by equal three yearly installments of Kshs.13, 000 each.”*

The Petitioners have therefore challenged the above resolution on grounds that it violates their right to fair labour practices as enshrined under **Article 41** of the **Constitution** and is a violation of their right to religious belief as provided for under **Article 32 of the Constitution**.

Petitioners’ case

4. Mr. Obondi, learned counsel and the 1st Petitioner presented the Petitioners’ case. It was his submission that the Respondent’s Notice of the SGM did not also give notice of intention to propose the impugned resolution contrary to **Section 2 of the LSK Act**. In that regard he stated that the SGM could not therefore legally pass the impugned resolution and that members of the Respondent and in particular the Petitioners were denied the right to information that would have enabled an informed participation in the discussion of the impugned Resolution.
5. He further submitted that the said resolution was not passed by more than two-thirds of the members of the Respondent present at the SGM, therefore violating the provisions of **Section 2** of the **LSK Act** as read with **Regulation 33(2)** of the **LSK (General Regulations) 1962**. He therefore claimed that the SGM having been called and conducted in contravention of the mandatory provisions of the LSK Act and Regulations is null and void *ab intio*.
6. It was the Petitioners’ further case that the subject loan is an interest loan and that the Respondent has the statutory mandate to borrow but he challenged the method adopted in that regard. He claimed that compelling the Petitioners to contribute money to be employed in servicing, securing and guaranteeing an interest earning loan facility is against the Islamic faith and belief that prohibits the taking and payment of *Riba* interest and therefore a violation of their right not to be compelled to act or engage in any act that is contrary to their belief or religion.
7. It was also his position that the LSK Arbitration Centre would have an establishment serving

- alcoholic drinks and that the Resolution compelling them to contribute or participate in any way to facilitate the construction of a bar serving alcoholic drinks is against their Islamic faith and therefore a violation of their religion as provided under **Article 32(4)** of the **Constitution**. He claimed that it is against the Islamic religion and a sin for any Muslim to manufacture, store, sell, buy, transport, and drink or in any way participate in or contribute to the manufacture, storage, selling, buying, transporting or drinking of alcohol.
8. It was Mr. Obondi's submission that prohibition of alcohol and interest forms an essential part of the Islamic faith held by the Petitioners. He claimed that the Noble Quran and Hadith of the Prophet Mohamed (PBUH) states that; "**alcohol is the mother of all evils**" and as such it is central to a Muslims' faith to keep away from evil.
 9. He contended that the right to freedom of religion has two faces; the right to believe which is absolute and the right to manifest which may be limited in accordance with **Article 24** of the **Constitution**. He relied on the Canadian Supreme Court case of *Syndicate Northcrest vs Amselem (2004) 2 S.C 47* where the Court stated that freedom of religion protected both religious beliefs considered to be highly personal and private in nature and the consequent religious practices. On the same principle, he also relied on the Supreme Court of South Africa case of *Department of Correctional Services & Another vs Police and Prisons Civil Rights & 5 Others CA 6/2 V*. He also relied on the case of *Seventh Day Adventist (East Africa) Ltd vs Minister for Education & 3 Others (2014) e KLR* where the test of proportionality was discussed. On the point that there should be reasonable accommodation of the right to religious belief, he relied on the case of *J. K (suing on behalf of CK) v Board of Directors of R School & Another (2014) e KLR, Prisca Kembo & 2 Others vs Kenya Post Office Savings Bank (2014) e KLR* where it has been held that a policy that does not make provision for examination of individual circumstances and anticipated exception is unreasonable.
 10. It was Mr. Obondi's further claim that the Petitioners' had not voluntarily accepted the impugned Resolution and that they had no knowledge that the Respondent does not accommodate their religious beliefs. As to whether the limitation of their right to observe their belief is valid, the Petitioners claimed that there is no law limiting their right to religion, to the extent that it prohibits them from participating in *Riba* interest transactions and alcoholic activities. As to whether **Section 4(g)** of the **LSK Act** was the law limiting the Petitioners' right to religion, Mr. Obondi submitted that LSK had not justified the criteria established under **Section 24(2) (c)** of the **Constitution** because the impugned resolution is not justified and reasonable in an open and democratic society.
 11. In any event, Mr. Obondi submitted that there was nothing so compelling about the subject project that it had to proceed even while in violation of the Petitioners' constitutional right. He claimed that there is no urgency in having an arbitration center in Nairobi for no one has suffered injustice over the years for lack of such a Centre. As regards modes of financing the project, he submitted that there are other many ways of doing so which do not violate the Petitioners' rights.
 12. On the right to fair labour practices, Mr. Obondi submitted that the attempt to peg the issuance of the 2015 practicing certificates to the payment of a member's contribution to the construction of the Arbitration Centre is unlawful. That **Section 27(a)** of the **LSK Act** empowers the Respondent's Council to make regulations prescribing annual subscriptions subject to approval by a Special Resolution and that there has not been a regulation made by the Respondent's Council and approved by a Special Resolution binding members of the Respondent to pay the Respondent any contribution towards the construction of the proposed Arbitration Centre. He claimed that the pegging of the contribution towards the subject Arbitration Centre to the issuance of a practicing certificate constitutes an unfair labour practice and a violation of **Article 41(c)** of the **Constitution** especially because it was mandatory for one to possess a practicing certificate so as to be able to practice law as an Advocate.
 13. Mr. Obondi prayed that the Petition be granted as prayed and grant the following orders;

“(1) A declaration that your Petitioners have a Constitutional right, not to be compelled to act, or engage in any act, that is contrary to their belief or religion.

(2) A declaration that the Law Society of Kenya Resolution of 27th September, 2014 on the financing of the Law Society of Kenya Arbitration Centre project violates your Petitioners’ rights under Article 32(3) & (4) of the Constitution to the extent that it compels your Petitioners – adherents of Islamic religion to pay for, contribute to, participate in or in any way facilitate the construction of a bar – establishment serving alcoholic drinks contrary to their Islamic faith and belief which prohibits the manufacture, storage, sale, purchase, transport, engagement in or facilitation of consumption of alcohol and is thus unconstitutional.

(3) A declaration that the Law Society of Kenya Resolution of 27th September, 2014 on the financing of the Law Society of Kenya Arbitration Centre project violates your Petitioners’ rights under Article 32(3) & (4) to the extent that it compels your Petitioners, adherents of Islamic faith and belief, which prohibits them from paying or taking interest and is thus unconstitutional.

(4) A declaration that the Resolution of the Respondent at the Special General Meeting of 27th September, 2014 on the Law Society of Kenya Arbitration Centre to the extent that it violates Article 32(4) of the Constitution contravenes the Constitution is invalid under Article 2 (4) of the Constitution.

(5) A declaration that the intended/threatened denial of Practicing Certificates to your Petitioners unless they participate in the charity contribution for the subject project, constitutes servitude and unfair labour practices contrary to Articles 30(1) and 41(1) of the Constitution respectively.

(6) A declaration that the Resolution of the LSK Special General Meeting of 27th September, 2004, on the Law Society of Kenya Arbitration Centre, to the extent that it was not duly convened with notice of the intention to propose such resolution contrary to Regulation 33 (2) of the LSK (General Regulations) 1962 as read with Section 2 of the Law Society of Kenya Act is null and void ab initio.

(7) An order of Judicial Review in the nature of prohibition, prohibiting the Respondent from compelling and/or executing any document binding the Petitioners to facilitate through contribution or any other means actions that are contrary to their religion and belief.”

The Respondent’s case

14. The Respondent, LSK is a statutory body responsible for the professional regulation of Advocates and established under **Section 3** of the **LSK Act**. It opposes the Petition through the affidavit of its Chief Executive Officer, Apollo Mboya, sworn on 6th November, 2014.
15. Mr. Mboya deponed that the Notice of the SGM was circulated to all members of the Respondent via post and email on the 18th August 2014 and subsequently, a reminder was sent by email on 25th September, 2014.
16. He also stated that from a perusal of the list of members of LSK who attended the SGM, none of the Petitioners attended. He thus claimed that the Petitioners cannot claim that the resolution is irregular when they had notice of it but failed to attend it.
17. It was also his position that the Petitioners and other members of the Respondent especially Alex Gatundu, Jacqueline Manani, MacMillan Jengo, Martin Maina, Macharia Nderitu and Kinyanjui Theuri have conducted themselves unprofessionally through various statements and the language they have used in social media and that they had also filed cases to wit; **Mombasa High Court Petition No.64 of 2014** and **Nairobi High Court Petition No.507 of 2014** challenging the

Resolutions made at the AGM.

18. He further claimed that in a bid to frustrate the funding of the project through letters dated 30th September, 2014, the Petitioners conspired and wrote to the Housing Finance Company of Kenya and Kenya Commercial Bank Ltd (the financial institutions that had been approached to fund the project by the LSK Project manager and the financial advisors) threatening the said institutions with law suits in the event they proceeded to fund the project. He stated that they acted in blatant disregard to the Resolutions passed at the SGM where the majority of the members had passed a resolution that mandated the Council to negotiate with various financial institutions in that regard. He averred that those actions were a deliberate attempt to sabotage the Resolutions passed in the General Meetings of 2012, 2013 and the SGM meeting of 2014.
19. He further stated that some of the Respondents' members had raised issues with the Resolutions at the SGM, on 8th October 2014, and the Chairman of the Respondent responded to all the issues of concern and invited those with better suggestions to share them but none of the Petitioners did so. Further, in a communication by LSK, the Chairman and the Council asked members to volunteer to formulate a committee of experts in the field of shares/special purpose vehicle in order to research on the issue and prepare a report to the Council and none of the Petitioners presented their names to participate in the said committee which would enable them canvass the issues now raised in this Petition.
20. It was his further deposition that in a letter dated 30th September, 2014 the Petitioners requested for certain information and documents in respect of the project and despite being provided with the available documents and being asked to visit the LSK secretariat to peruse the contractual documents, they ignored the same and proceeded to file the law suits aforesaid.
21. On the issue of construction of a bar within the LSK Arbitration Centre, Mr. Mboya deponed that the plans availed by the architect indicate that there will be a restaurant for purposes of serving both the 60 capacity hotel, the conference and arbitrations facilities and forums for continuous legal education. He averred that the Respondent is yet to make a determination as to what it is to be stocked at the restaurant. He opined that the envisaged situation would be for the Respondent to contract (outsource) a third party to run the hotel and restaurant. In any event, he claimed that even if there was an intention to construct a bar, the Petitioners are estopped from bringing such a claim at this late hour because as back as 2013 and 2014 in the Annual General Meetings, architectural drawings were displayed and a presentation made on the type of facilities that were being constructed and there being no objection to the facilities they were approved and a sum of Kshs.23, 000,000 has been expended as consultant fees in that regard.
22. On the borrowing of funds with interest, Mr. Mboya claimed that it was not the Petitioners that were participating in the borrowing but the Respondent, which is a statutory body distinct from the Petitioners as its members. That under **Section 4** of the **LSK Act**, the Respondent has powers to borrow funds in furtherance of its mandate and that the Petitioners are not supposed to pay any interest or principal sum on the loan as the Respondent shall repay both the loan and interest from funds generated from the project.
23. He further stated that the Petitioners were members of the Respondent by operation of the law and under **Section 23** of the **LSK Act** every advocate is subject to the Resolutions passed by the General Meetings of the Respondent.
24. According to Mr. Mboya, the planned construction of the Arbitration Centre will benefit the Petitioners and all advocates in the present and in future as huge rental income and profits will accrue from it. That some of the benefits to accrue include; substantial reduction in the continuous development fees (formerly CLE) by up to 70% as those events will be based at the center, enable financing of all the branches in Kenya without the need to increase annual subscription of advocates, provide office suites to advocates at subsidized costs especially young advocates, provide a modern and well equipped library, discounted rates to advocates who are accommodated

in the three star hotel, provide specialized rooms for conduction of arbitrations and mediations and provide office space to the LSK secretariat.

25. He further stated that the decision to levy a fee for purposes of funding the construction of the LSK Arbitration Centre was arrived at in a legal and procedural manner in the following manner (reproduced verbatim from his affidavit);

“(1) Over the last 20 years there have been several general resolutions passed at Annual General Meetings (AGM) of the Respondent to the effect that the property of the Respondent situated at South C Nairobi be developed for the benefit of the society. At the AGM held on 16th March 2013 a firm and specific resolution was passed to the effect that the Council of LSK should develop a concept and proposition on the type of development that is suitable for the benefit of the society and the profession. This resolution has never been opposed by any member nor overturned. Annexed and marked AM 13 is a true copy of the minutes.

(2) Pursuant to this resolution and with the professional advice by an architectural firm (M/S. Tectura International) the Council did identify the current project as the most suitable for the interest of development of practice of the law and the one that is beneficial to members. Further, in order to manage the risks involved Council appointed M/s. Mwazoni Ltd and PKF as the Project Managers and Financial Advisors for the project respectively.

(3) As part of research work on the project and for purposes of public participation and consultations, the project manager prepared a questionnaire, which was circulated to all members for their comments and input. None of the named Petitioners bothered to respond to the questionnaire. Annexed and marked AM14 is a true copy of the questionnaire.

(4) The Architect, the Project Manager and the Financial Advisor have prepared comprehensive reports on the financial viability of the project including a feasibility study, which reports have been circulated to members. Annexed and marked AM15 are true copies of the reports.

(5) At an AGM held on the 15th March 2014, the Council gave an update of the project with the project manager making a presentation on the appropriate financial doodles. It was resolved at that meeting that the Council should proceed to engage and pay other consultants who are necessary in the project with a view to presenting before an SGM a full report on the cost estimates, the most suitable financial model and the expected contribution from members. These resolutions have never been challenged by any member nor set aside. Annexed and marked AM16 is a true copy of the minutes of the said AGM.

(6) In consultation with all the consultants, the project manager prepared the project summary of financials, a proposal for members' contribution and a loan and payment schedule. All the said reports have been circulated to members. Annexed and marked bundles AM17 are true copies of the reports.

(7) The Quantity Surveyor has done an elaborate report on the procedures to be followed in preparation of Bill of Quantities. Annexed and marked AM18 is a true copy of the report.

(8) On 18th August 2014 I circulated a notice to convene a Special General Meeting (SGM) with the agenda for the meeting being “the LSK International Arbitration Centre”. This notice was sent by postal mail, e-mail and a subsequent reminder was sent by email two days before the SGM. As lawyers we all know that the purpose of the notice was both to ask members to attend the meeting and to invite any comments, issues or concerns about the agenda. No such inquiry, concern or comments were ever raised. All members were aware of this issue on the development of the said property since there was communication on it that was conveyed to members through the following medium;

- *The LSK newsletter*
- *LSK website*
- *All CLE events*
- *LSK annual conference*
- *At all branches*
- *The Advocate magazine*

(9) At the above-mentioned SGM a total of 547 members attended. The project manager made a presentation on the financial model. The laid down procedure for conducting the SGM was followed to the letter and a vote taken after the end of the debate on both the financial model and the proposed motion on funding of the project. Annexed and marked AM19 is true copy of the persons who attended the meeting.

(11) The following motion was passed at the SGM;

“As a means of raising funds towards the construction of the Law Society of Kenya International Arbitration Centre, Offices and Convention Centre, the meeting authorizes borrowing to cater for part of the construction costs and that all members of the law Society of Kenya do contribute towards part of the said costs as follows;

- a. **For all members who have practiced for less than 5 years, a sum of Kenya Shillings thirty Nine Thousand (Kshs.39,000/-) payable in three(3) installments of;**
 - **Kshs.13,000 on or before 28th February 2015**
 - **Kshs.13,000 on or before 28th February 2016**
 - **Kshs.13,000 on or before 28th February 2017**
- b. **For all members who have practiced for 5 years but less than 20 years, a sum of Kenya Shillings Thirty Nine Thousand (Kshs.39,000/-) in two installments as follows;**
 - **Kshs.19,500 on or before 28th February 2015**
 - **Kshs.19,500 on or before 28th February 2016**
- c. **For all other members who have practiced for 20 years and above, one off contribution of Kshs.50,000 payable on or before 28th February 2015.**
- d. **For advocates who are to be admitted to the bar after the 28th February 2015 by three equal installments of Kshs.13,000/- each.”**

26.Mr. Mboya further averred that to - date, a decision is yet to be made by the Council on how it will execute the decision made at the SGM. That there are various means in which the Council may implement the said decision including; collecting the said sum as part of the levy for Continuous Professional Development and a member who fails to pay may not be held in good standing; issue a demand letter to a defaulting member with attendance consequence of a disciplinary matter; display in the LSK website the members who have not complied with the SGM resolution and fail to issue a practicing certificate.

27.He finally stated that a number of the Respondent’s members have already started making contributions in that regard and so the Petitioners are in the minority.

28. Mr. Ahmednassir, Senior Counsel, presented the Respondent's case and it was his submission that the issue of the LSK Arbitration center has nothing to do with the religious beliefs of the Petitioners. He urged the Court to apply the proportionality test in balancing the conflicting interest as between the Petitioners and the Respondent and on that issue he relied on the case of *Christian Education South Africa vs Minister for Education CCT 4/2000* and also the case of *Seventh Day Adventist Ltd vs Minister for Education and 3 others (supra)*.
29. As regards the claim of an irregular SGM, he stated that the provisions of **Section 19 and 20** of the **LSK Act** gives a certain criteria for convening an SGM and the vote needed to pass a resolution. That the notice calling for a meeting was circulated to members of the Respondent by post and email. The Notice specified the place, date and time the SGM was to be held and that the Petitioners did not attend the SGM nor did they send in their apologies for non-attendance and as such they cannot be heard to say the proceedings are a nullity.
30. It was Mr. Ahmednassir other submission that the Court does not have powers to review or interfere with a resolution made by the members of the Respondent and that such a resolution can only be reviewed by the members of the Respondent themselves.
31. On the issue of borrowing of funds for project, he claimed that it is the Respondent who is borrowing in its own name but not the Petitioners and on that issue he further stated that the Respondent had not made a decision on the particular mode of financing. In any event, he claimed that the Petitioners will only contribute to the construction of the Arbitration center and nowhere has it been indicated that the interest will accrue and be paid by the Petitioners directly.
32. As regards the bar establishment, Senior Counsel claimed that the Respondent would seek a third party to run a hotel and a restaurant and that it was not the Respondent that seeks to run the facilities at the center. Professionals and competent bodies would instead be contracted to do so.
33. As regards the issuance of a practicing certificate, he submitted that under **Section 21** of the **Advocates Act**, the practicing certificate is issued by the Registrar of the High Court and not the Respondent and all arguments on that point are therefore moot.
34. Mr. Ahmednassir therefore urged the Court to dismiss the Petition with costs to the Respondents.

Determination

35. Having set out the Parties' submissions as above, I am of the view that there is only one issue for determination; whether the Petitioners' right to freedom of religion has been violated and to what extent if at all by the Resolution subject of these proceedings. As a corollary, the question whether the Petitioners' right to fair labour practices has been violated will be addressed.
36. In that regard, the right to religion is provided for under **Article 32** of the **Constitution** as follows;
- “(1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.**
- (2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.**
- (3) A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.**
- (4) A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.**

Of importance to this judgment is **Article 32(1)** and **(4)** above; the right to freedom of religion and

belief and the right not to be compelled to act, or engage in any act that is contrary to the person's belief or religion.

37. In the above context, the Petitioners have alleged that their freedom of religion has been violated on two fronts; firstly, that the intended LSK Arbitration Centre is being funded on an interest earning loan allegedly contrary to their Islamic faith and belief that prohibits the taking and payment of a loan with Riba interest and therefore a violation of their right not to be compelled to act or engage in any act that is contrary to their belief or religion contrary to **Article 32(4)** of the **Constitution**. Secondly, that the Resolution by LSK that they should pay for, contribute to or participate in, or to facilitate the construction of a bar establishment serving alcoholic drinks is against their Islamic faith and is a contravention of their right not to be compelled to engage in any act that is contrary to their belief or religion under **Article 32(4)** of the **Constitution**.

38. On its part, the Respondent contends that the Respondents is a statutory body with the legal powers to borrow. Funds and has stated that it is not the Petitioners who are borrowing but the Respondent which is a statutory body empowered by the law to do so. As regards the issue of establishing a bar at the intended Arbitration Center, the Respondent states that it will not get involved in the business of running a bar but will instead allow a third party to do so.

39. On my part, whereas the Constitution has not defined religion and the enjoyment of that right, the European Court on Human Rights in *Hasan and Chaush vs Bulgaria (2002) 34 EHRR 55* while defining the normative content of the right to religion as provided for under **Article 9** of the **European Convention on Human Rights** observed that the right to religion encompasses the right to hold as distinct from the right to manifest religious and other beliefs. The Court went on to state that the right to manifest a belief is a qualified right and its limitation is permissible if it is prescribed by law and can be justified as necessary in a democratic society in the interests of public safety, the protection of public order, health or morals or the protection of the rights and freedoms of others.

40. Further in *Syndicate Northcrest vs Amselem (supra)* the Supreme Court of Canada in defining the concept of freedom of religion expressed itself as follows;

“Freedom of religion under the Quebec Charter of Human Rights and Freedoms (and the Canadian Charter of Rights and Freedoms) consists of the freedom to undertake practices and harbor beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials. This understanding is consistent with a personal or subjective understanding of freedom of religion. As such, a claimant need not show some sort of objective religious obligations, requirement or precept to invoke freedom of religion. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection. The State is in no position to be, nor should it become, the arbiter of religious dogma.”

41. Similarly, in the English case of *Williamson vs Secretary of State for Education and Skills (2005) AC 246* Lord Nicholls had the following to say;

“Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilized society individuals respect each other's beliefs. This enables them to live in harmony.”

In *R vs Big M Drug Mart Ltd (1985) 1 RCS 295* Dickson CJ stated as follows;

“The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice of by teaching and

dissemination.”

Lastly, in *Christian Education South Africa vs Minister for Education (supra)* Sachs J opined as follows;

“There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believers' view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.”

I am in agreement with the above expressions of the law and it is clear to my mind that religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integral link to his or her self-definition and spiritual fulfillment; the practices which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith. That is the nature of the right to freedom of religion as I understand it and as is envisaged under **Article 32** of the **Constitution**.

42. Freedom of religion is also triggered when a Petitioner demonstrates that he or she sincerely believes in a practice that has a nexus with religion but, it is not judicious of any Court to determine the validity of the belief in question.
43. However, once an allegation of religious freedom is made, the Court must ascertain whether there has been an interference with the exercise of the right to religion so as to constitute an infringement on the same under **Article 32** of the **Constitution**. Once such infringement has been established, the Court must move a step further and determine whether such an infringement is in any way reasonable and justified. This is because the ultimate protection of the right to freedom of religion must be measured in relation to other rights; with a view of underlying the context in which the apparent conflict arises.
44. Further and generally so, in resolving the conflict between different rights, a Court will be guided by the proportionality test as set out under the case of *Christian Education South Africa vs Minister for Education (supra)* and approved by this Court in *SDA (East Africa) Ltd vs Minister fir Education* as follows;

“The most complex problem is that the competing interests to be balanced belong to completely different conceptual and existential orders. Religious conviction and practice are generally based on faith. Countervailing public or private concerns are usually not and are evaluated mainly accordingly to their reasonableness. To the extent that the two orders can be separated, with the religious being sovereign in its domain and the state sovereign in its domain, the need to balance one interest against the other is avoided. However religion is not always merely a matter of private individual conscience or cononical sectarian practice. Certain religious sects do turn their back on the world, but many major religions regard it as part of their spiritual vocation to be active in the broader society. Not only do they proselytise through the media and in the public square, religious bodies play a large part in public life, through schools, hospitals and poverty relief. They command ethical behavior from their members and bear witness to the exercise of power by state and private agencies; they promote music, art and theater; they provide halls for community activities, and conduct a great variety of social activities for their

members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the constitution. Religion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and culture."

The court went on to state that;

"The result is that religious and secular activities are, for purpose of balancing, frequently as difficult to disentangle from a conceptual point of view as they are to separate in day to day practice. While certain aspects may clearly be said to belong to the citizen's Caesar and others to the believer's God, there is a vast area of overlap and inter-penetration between the two. It is in this area that balancing becomes doubly difficult, first because of the problems of weighing considerations of faith against those of reason, and secondly because of the problems of separating out what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way."

45. In the above context, in the case of **S vs Zuma & Others (1995)2 SA 642(CC)**[\[A1\]](#) the South African Constitutional Court held that a party alleging violation of a constitutional right or freedom must demonstrate that the exercise of a fundamental right has been impaired, infringed or limited. Once a limitation has been demonstrated, then the party which would benefit from the limitation must demonstrate a justification for the limitation. In arriving at a fair decision, where a conflict is alleged, a Court must engage in a balancing exercise of the right and the limitation thereof. That is why in **S vs Manamela and Another (2000) (5) BCLR 491**, the Court observed as follows;

"In essence, the Courts must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values protected...Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness."

46. I am in agreement and to my mind, the tests set out above echo the requirements of **Article 24** of the **Constitution**. This Article expresses the manner of considering the constitutionality of a limitation on fundamental rights by requiring that such limitation should be reasonable and justifiable in a free and democratic society and that all relevant factors are taken into account, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to balance the rights and freedoms of an individual against the rights of others and the relation between the limitation and its purpose, and whether there are less restrictive means to achieve the purpose. For avoidance of doubt, **Article 24** of the **Constitution** states as follows;

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any

individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

2. Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

- a. in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;*
 - b. shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and*
 - c. shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.*
- 3. The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.*

47. It is therefore against the tests and principles set out above I shall determine the Petition before me.

48. In his affidavit in support of the Petition, Issa Suleiman, Deputy Imam at Adams Mosque and Muhamad Abdalla, Da'awah Officer at Jamia Mosque, at paragraph 2 stated that it is against the Islamic religion for a Muslim to manufacture, store, sell, buy, transport or drink alcohol and/ or participate in the said acts. Their affidavits were the same in language and tenor. They both stated;

“(1) That I aver that, it is against the Islamic religion and a sin for any Muslim to manufacture, store, sell, buy, transport, drink or in any way participate in or contribute to the manufacture, storage, selling, buying, transporting or drinking of alcohol and the Noble Quran in particular decrees thus;

“O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone alters [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful. Satan only wants to cause between you animosity and hatred through intoxicants and gambling and to avert you from the remembrance of Allah and from prayer. So will you not desist?” (Chapter 5, verses 90 – 91).

(2) That the prophet (sal Allahu alaihi wa sallam) said; “Allah has cursed Khamur (intoxicants – alcohol, wine etc), the one who drinks it, the one who pours it for others, the one who sells it, the one who buys it, the one who makes it, the one who it is made for, the one who carries it, the one who it is carried to and the one who consumes the money from its sale.” (Tirmidhiy, Abu Dawuud and Ibn Maajah).

- 4. That the Prophet (sal Allahu alaihi wa sallam) said; “Every intoxicant is Khamur, and every intoxicant is haram (prohibited).” [sahih Al-Bukhari and Muslim].*
- 5. That alcohol leads to many harmful things, and deserves to be called “the mother of all evils” – as it was described by the Prophet (sal Allahu alaihi wa Sallam), who said; “Alcohol is the mother of all evils” [Classed as Hassan by Shakyh al-Albaani in al-Silsilah al-Saheehah, 1854].”*

49. On the second contention, the Petitioners claim that they are being compelled to service an interest earning loan contrary to their Islamic faith and belief which prohibits them from paying or taking

interest. On that issue, Issa Suleiman and Muhamad Abdalla deponed as follows;

“(1) That it is against the Islamic religion and a sin for any Muslim to take, pay, contribute, facilitate or in any way participate in the taking and payment of Interest.

The Noble Quran in Particular decree thus;

“Those who consume interest cannot stand [on the Day of Resurrection] except as one stands who is being beaten by Satan into insanity. That is because they say, “Trade is [just] like interest.” But Allah has permitted trade and has forbidden interest. So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah. But whoever returns to [dealing in interest or usury] – those are the companions of the Fire; they will abide eternally therein” (Chapter 2, verse 275).

“O you who have believed, fear Allah and give up what remains [due to you] of interest, if you should be believers. And if you do not, then be informed of a war [against you] from Allah and His Messenger. But if you repent, you may have your principal – [thus] you do no wrong, nor are you wronged” (Chapter 2, verses 278-279).

(2) That the Prophet said; “Allah has cursed the one who consumes Riba (i.e. usury or interest), the one who gives it to others, the one who records it and the one who witnesses it.” [Muslim].

(3) That Jabir reported; The Prophet cursed the receiver and the payer of interest, the one who records it (the contract) and the two witnesses to the transaction and said, “they are all alike (in guilt).”

(4) That Jabir ibn Abdullar, giving a report on the Prophet’s farewell pilgrimage, said; The Prophet addressed the people and said, “All the Riba al-Jahiliyyah is annulled, the first Riba that I annulled is our riba, accruing to al-Abbas ibn Abdul Mutalib (the Prophet’s uncle).

(5) That Abu Hurayrah narrated that the Prophet said; “Allah would not allow four persons to enter paradise or to take its blessings; he who drinks wine, he who takes riba, he who usurps an orphan’s property without right and he who is undutiful to his parents.”

6. That Abdur-Rahman Ibn Abudllah Ibn Mas’ud said; “When usury and fornication appear in a community, the people of that community render themselves deserving of the punishment of Allah.” (Reported by al-Haakim)

(7) That Anas related, “The Messenger of Allah (pbuh) preached us and expounded the question of usury by saying, “One Dirham gained by usury is more heinous than thirty six times of adultery at the sign of Allah .”

50. Looking at the above deposition and the pleadings, it is clear that the matter before me is not one as to whether the Petitioners have the right to hold the above believes because that is not contested. It is one about whether the Respondent’s Resolution violates those believes and therefore a violation of the Petitioners’ right to religion as stipulated under **Article 32** of the **Constitution**.

51. The Respondent on its part has denied that there will be a bar establishment within the proposed LSK Arbitration Centre and that it is not engaging in the borrowing of any interest earning loan.

52. On the issue of the bar establishment serving alcoholic drinks, Mr. Mboya deponed as follows;

“4.1 It is not true that the Respondent is keen to construct a bar. The plans by the architect clearly indicate that there will be a restaurant for purposes of serving both the 60 capacity hotel,

the conference facilities, the arbitration facilities and for forums on continuous legal education.

4.2 *The Respondent is yet to make a determination as to what is to be stocked at the restaurant.*

4.3 *The envisaged situation is for the Respondent to contract (outsource) a third party to run the hotel and restaurant.”*

53. As appears from the averments before me, the Respondent has denied that there will be bar per se serving alcoholic drinks at the LSK Proposed Arbitration Center. Mr. Mboya stated that there will be a restaurant which will not be managed by the Respondent but a third party whom it shall contract to do so. He also stated that it has not been decided as to what is to be stocked at the said restaurant. In that context I did not hear the Petitioners to be questioning the establishment of a restaurant at the proposed LSK Arbitration Centre and simply and to that extent therefore, I do not see any violation with their right to religion. I also did not hear them to be having a quarrel with the fact that the Respondent will contract a third party to run the restaurant in the event it is established in the proposed LSK Arbitration Centre. I believe Mr. Mboya to that extent and that being so the enquiry ends there because the complaint about a bar is purely speculative at this point. There is therefore no need for me to go beyond my findings above.

54. On the issue of borrowing an interest earning loan in violation of the Petitioners' Islamic religion, Mr. Mboya stated that it was not the Petitioners who would be engaged in the act of borrowing but the Respondent which is a statutory body distinct from the Petitioners. Further, that the Petitioners shall not be required to pay any interest on the loan even or principal sum thereof. He stated that the facilities and income of the proposed Arbitration Centre shall repay both the loan and interest.

55. In that regard, under **Section 4 of the LSK Act (Chapter 18 Laws of Kenya)**, the Respondent's objects are as follows;

“(a) to maintain and improve the standards of conduct and learning of the legal profession in Kenya;

(b) to facilitate the acquisition of legal knowledge by members of the legal profession and others;

(c) to assist the Government and the Courts in all matters affecting legislation and the administration and practice of the law in Kenya.

(d) to represent, protect and assist members of the legal profession in Kenya in respect of conditions of practice and otherwise;

(e) to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law;

(f) to acquire, hold, develop and dispose of property, whether movable or immovable, and to derive capital or income therefrom, for all or any of the foregoing object;

(g) to raise or borrow money for all or any of the foregoing objects in such manner and upon such security as may from time to time be determined by the Society. [Emphasis added]

(h) to invest and deal with moneys of the Society not immediately required in such manner as may from time to time be determined by the Society; and

(i) to do all such other things as are incidental or conducive to the attainment of all or any of the foregoing objects.”

It is clear therefore that the Respondent has the power to acquire, hold and develop any property. Similarly, it has the powers to raise or borrow money for the purposes of achieving any of its objects. The LSK Act does not also stipulate the manner in which the Respondent is to engage in the acts of raising or borrowing money.

56. Specifically as to how it would finance the construction of the proposed LSK Arbitration Centre, the members of the LSK at the SGM aforesaid passed a resolution that all its members would participate and contribute towards that end. The Petitioners are members of the Respondent by virtue of **Section 28** of the **Advocates Act (Cap 16 Laws of Kenya)**. The Resolution as stated elsewhere above, did give the criteria on how each of the member would contribute towards the 30 % of the project cost and the remaining 70% of the project costs was to be financed through a loan facility. Mr. Mboya in his affidavit stated that the loan would be repaid through the use of the facility and none of the members would be compelled to contribute towards it, a position I did not hear the Petitioners to challenge.

57. That being so, I am unable to understand how the Petitioners are being compelled to contribute money that will be employed in servicing an interest earning loan facility against their Islamic religion. I have in that regard looked at the Petitioners' pleading and save for what I will say shortly, I did not hear them to challenge the individual contribution of the 30 % of the project cost as being in violation of their Islamic faith. Having said so, I then have to reach the inevitable conclusion that their right to religion has not been violated.

58. My findings above would have been sufficient to dispose of the Petition before me. However, I recall the Petitioners had a further grievance; that the Respondent's attempt to peg the issuance of the 2015 practicing certificates to the payment of the members' contribution to the construction of the proposed LSK Arbitration Centre is unlawful and a violation of their right to fair labour practices as envisaged under **Article 41** of the **Constitution**.

59. **Article 41** of the **Constitution** provides for labour relations in the following manner;

“(1) Every person has the right to fair labour practices.

(2) Every worker has the right—

(a) to fair remuneration;

(b) to reasonable working conditions;

(c) to form, join or participate in the activities and programmes of a trade union; and

(d) to go on strike.

(3) Every employer has the right—

(e) to form and join an employers organisation; and

(f) to participate in the activities and programmes of an employers organisation.

(4) Every trade union and every employers' organisation has the right—

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining."

60. It is the Respondent's case in the above context that no Resolution has been made by the Respondent's Council and approved by a Special Resolution binding members of the Respondent to pay the said contribution and peg the payments to issuance of a practicing certificate.

61. In that regard, under **Section 8** of the **LSK Act**, every member of the Respondent is obligated to pay it such annual subscriptions as may be described from time to time. Further, **Section 23** of the **Advocates Act** states as follows;

"Issue of practicing certificate to confer membership of Society

1. Every advocate to whom a practicing certificate is issued under this part shall thereupon and without payment of any further fee, subscription, election, admission or appointment, and notwithstanding anything contained in the Law Society of Kenya Act (Cap 18) or in any regulations made thereunder, become a member of the society and the Advocates Benevolent Association and be subject to any provision of law or rule of the Society and the Advocates Benevolent Association for the time being affecting the members thereof. [Emphasis added]"

62. It is clear that a member of the Respondent is subject to the provision of law or rules of the Respondent including its Resolutions. Under **Section 27** of the **LSK Act**, the Respondent may make regulations with approval by a special resolution, binding on all members prescribing annual subscriptions. In its SGM held on 27th September, 2013 the members of the Respondent resolved to contribute to the financing of the construction of the proposed LSK Arbitration Center in the manner stated elsewhere above.

63. I did not hear the Petitioners claim that a Resolution requiring members to pay and or contribute towards the proposed construction of the LSK Arbitration Centre was not passed. The Petitioners have only, in my view, challenged the pegging of the issuance of the practicing certificate to the said contribution.

64. Mr. Mboya stated that at the SGM a decision was not made on how the Council should execute the Resolution. He stated that the Respondent had various methods through which it could execute the Resolution including the failure to issue a practicing certificate.

65. In that regard, I have found that a Resolution was passed requiring the Respondent's members to contribute towards the construction of the LSK Arbitration Centre. I have also found that a decision was not made on how the said contribution was to be made.

66. Thus far, it is clear that it is not stated how the Respondent has violated the Petitioners' right to fair practice by its decision to peg issuance of a practicing certificate to the payment of a member's fee towards the intended construction of the Arbitration Centre. It is a well-established rule in constitutional litigation that a party must plead his case with some degree of precision and set out the manner in which the constitution has been violated. See ***Anna Rita Karimi Njeru v Republic (1976-1980) 1 KLR 14*** and ***Trusted Society of Human Rights vs Mumo Matemu and Another Petition No. 279 of 2012.***

67. I say so because while the Petitioners have set out what right they claim has been violated, they have failed to disclose in that regard the manner in which the right to labour practices has been violated. That is therefore all there is to say on that aspect and I am also aware that the same matter is receiving direct attention in other proceedings before the High Court.

68. Lastly, before I wind up this judgment, I am aware that the Petitioners have also challenged the Notice convening the SGM as being contrary to the provisions of **Section 2** of the **LSK Act**. They claimed that the SGM having been unlawfully convened could not pass legally enforceable

Resolutions. They claimed that the Resolution was not passed by not less than two-thirds of the members present at the SGM as is statutorily provided.

69.A Special Resolution has been defined under **Section 2** of the **LSK Act** as follows;

“means a resolution passed by not less than two-thirds of such members of the Society as may be present and voted thereon at a general meeting of the Society, duly convened with notice of the intention to propose such resolution, or, in the case of a postal ballot, not less than two-thirds of those effectively participating therein.”

70.The law is clear that a Special Resolution of the Respondent must be passed by not less than two-thirds of the members present at the SGM and not simply a majority vote. The large question therefore is whether the law was flawed in that regard.

71.That is an issue of fact that can only be determined by availing the evidence. Sadly, I do not have any evidence on the SGM that would help the Court determine that issue. For instance, where are the Minutes of the SGM or the voting results? All I have on record as regards the SGM of 17th September, 2014 are the names of the persons present. Clearly, that cannot help this Court determine the Petition one way or another.

Conclusion

72.The right to practice and manifest a religion or belief is intensely personal to any individual. It impacts on all aspects of life including such an individual’s professional life. The Petitioners are all advocates of the Muslim faith as is the Counsel for the Respondents. That they have taken divergent views of the matter at hand only shows the great need for a Court to balance individual positions on religion and belief and the rights of others.

73.In the end on the two main complaints by the Petitioners I have found that **Article 32** as read with **24** of the **Constitution** was not violated. The result is that;

- i. The Petition herein is hereby dismissed with costs.
- ii. Each Party will bear its own costs.

74.Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF SEPTEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Kazungu – Court clerk

Mr. Odhiambo holding brief for Mr. Obondo for Petitioner

Mr. Cohen holding brief for Mr. Ahmednasir for Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE
